RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

No. 90-7347

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court's limitation of petitioner's cross-examination of a government witness was harmless error.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-7347

ROY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1990. The petition for a writ of certiorari was filed on March 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiracy to commit murder, in violation of 18 U.S.C. 1117, and second degree murder, in violation of 18 U.S.C. 1111. He was

sentenced to 30 years' imprisonment. The court of appeals affirmed. Pet. App. 1-15.

1. Petitioner, an inmate at Lorton Reformatory, was involved in planning and carrying out the murder of another inmate. He was charged with conspiracy to commit murder and first degree murder. Pet. App. 3-4.

Prior to trial, the government moved for an order prohibiting petitioner's counsel from eliciting testimony that the penalty for first degree murder is mandatory life imprisonment during his cross-examination of a government witness. The witness, Cornell Warren, had also been charged with conspiracy and first degree murder in connection with the killing, but had entered a guilty plea on the conspiracy charge and had agreed to testify as a witness for the government at petitioner's trial. In response to the government's motion, the district court told petitioner's counsel that he could question Warren about his plea negotiations with the government, but should not reveal the sentence Warren had faced for first degree murder. Pet. App. 4.

At trial, petitioner's counsel attempted to cross-examine Warren about his plea agreement with the government in an effort to undermine his credibility. When the government objected, the district court took over questioning of the witness. After Warren gave arguably inconsistent answers concerning his

understanding of the benefits of the plea agreement,[1/] the court ended the questioning and ordered petitioner's counsel to "[m]ove onto something else." Pet. App. 4, 6. The jury convicted petitioner of conspiracy to commit murder and second degree murder. Pet. App. 5.

2. On appeal, petitioner argued that the district court's restriction of his cross-examination of Warren violated his rights under the Confrontation Clause of the Sixth Amendment. Pet. App. 5. The court of appeals found it "a close question" whether petitioner's confrontation rights were "substantially infringed" by the district court's preemption of his cross-examination of Warren, but stated that "[f]or purposes of this appeal," it would "assume that constitutional error was committed." Pet. App. 10-11. The court concluded, however, that because the error was "harmless beyond a reasonable doubt," reversal of petitioner's conviction was not required. Pet. App. 13.

In addressing the harmless error question, the court stated that the appropriate inquiry, as set forth by this Court in Delaware v. Van Arsdall, 475 U.S. 673 (1986), is "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that

---

[1/] Warren first testified that his lawyer had told him that by pleading guilty he would probably receive a lesser sentence than if he were tried and convicted. Pet. App. 6. In response to a subsequent question, however, he stated that his lawyer had "said that if I pled guilty, I could be given up to the same amount of time if I had gone to trial." Ibid. Strictly speaking, of course, these two statements are not inconsistent.

the error was harmless beyond a reasonable doubt." Pet. App. 11 (quoting Van Arsdall, 475 U.S. at 684). The court of appeals noted that the Van Arsdall Court identified a number of factors to be considered in determining whether the erroneous restriction of a defendant's cross-examination of a government witness was harmless, including the "importance of the witness's testimony to the prosecution's case; whether the testimony was cumulative; presence or absence of evidence corroborating or contradicting the material testimony of the witness; the extent of cross-examination permitted; and, of course, the overall strength of the prosecution's case." Pet. App. 11-12. See Van Arsdall, 475 U.S. at 684.

The court then summarized the government's evidence against petitioner, explaining that it was "[e]ssentially discounting Warren's testimony except as it is corroborated by other evidence, and considering all that remains in the light most favorable to the government." Pet. App. 12. The evidence showed that petitioner and a co-defendant engaged in a fight with the victim and then agreed that they would kill him. After obtaining prison-made knives, the two men went to the victim's dormitory. There, petitioner restrained the only prison guard who was present, while his co-defendant stabbed the victim. Pet. App. 12-13. The court noted that the only evidence offered by petitioner to dispute the government's case against him was petitioner's testimony that he had restrained the guard to protect him from harm. Pet. App. 13.

The court then applied the factors set forth in Van Arsdall. It found that Warren's testimony, "though undoubtedly helpful to the prosecution, * * * was to a large extent either cumulative or generally corroborated by other testimony." Pet. App. 13. The court also noted the "great overall strength of the government's case independently of Warren's testimony." Ibid. The court concluded that even "with Warren's testimony fully discounted," the evidence was "overwhelming that [petitioner] was involved in the planning and execution of the murder." Ibid. Accordingly, the court held that "any error in restricting the impeachment of Warren as a witness was harmless beyond a reasonable doubt." Ibid.

ARGUMENT

Petitioner contends (Pet. 4-7) that the court of appeals applied the wrong standard in determining that any error in the district court's limitation of his cross-examination was harmless. He asserts that the court of appeals, by viewing the evidence "in the light most favorable to the government," confused the harmless error standard with the test for determining whether the government's evidence was sufficient to support a conviction. Petitioner's contention rests on a misreading of the court of appeals' opinion.

Petitioner relies on the court's statement that the evidence against petitioner, viewed "in the light most favorable to the government," was "obviously sufficient to convict." Pet. App. 12-13. But the court of appeals' analysis did not stop there.

After reviewing all the evidence -- including petitioner's testimony in his own defense -- the court stated that it "was confident that the evidence, with Warren's testimony fully discounted, was overwhelming that [petitioner] was involved in the planning and execution of the murder." Pet. App. 13. Applying the factors enumerated in Delaware v. Van Arsdall, supra, the court concluded that any error in the restriction of petitioner's cross-examination of Warren was "harmless beyond a reasonable doubt." Pet. App. 13. Thus, the court of appeals adhered to "the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Van Arsdall, 475 U.S. at 681. No further review is warranted.[2/]

[2/] Petitioner's suggestion (Pet. 6) that the court of appeals' decision in this case conflicts with the decision in Taylor v. United States, 414 F.2d 1142 (D.C. Cir. 1969), is incorrect. In Taylor, the court held that the erroneous admission of two witnesses' in-court identifications of the defendant was harmless. Id. at 1144. The court explained that it arrived at this conclusion by "look[ing] to all the evidence, defense and prosecution alike, and bring[ing] our judgment to bear upon the question of whether it is clear to us beyond a reasonable doubt that a guilty verdict would have resulted even if the jury had never heard the challenged testimony." Id. at 1144-1145 (footnote omitted). That is essentially the analysis the court of appeals applied here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

NINA GOODMAN
Attorney

JUNE 1991

NO. 90-7347

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ROY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED COPIES OF THE BRIEF FOR THE UNITED STATES IN OPPOSITION BY MAIL ON June 14, 1991.

FRED WARREN BENNETT
FEDERAL PUBLIC DEFENER
MARY MELISSA FRENCH
ASSISTANT FEDERAL PUBLIC DEFENDER
401 EQUITABLE BANK CENTER, TOWER II
100 SOUTH CHARLES STREET
BALTIMORE, MD 21201

Kenneth W. Starr

KENNETH W. STARR
SOLICITOR GENERAL

June 14, 1991